82-1044

No. —

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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES HOUSE OF REPRESENTATIVES, APPELLANT

v.

FEDERAL TRADE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTIONAL STATEMENT

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Counsel for the House of Representatives.

Of Counsel:
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New York, New York 10023
(212) 841-5242

QUESTIONS PRESENTED

1. Whether Article III permits private parties to instigate a constitutional controversy between the Executive and Legislative Branches, a controversy foreign to the private parties, by the expedient of naming as defendants (a) an independent administrative agency, represented by counsel for the Executive Branch, and (b) the two Houses of Congress, neither of which has statutorily consented to such a suit and both of which were exercising legislative discretion in their challenged actions.

2. Whether consumer organizations, including members, employees and contributors, have Article III standing to challenge the constitutionality of congressional disapproval of the FTC's proposed Used Car Rule on the claim that unidentified members (a) "can be expected to buy used cars" in the indefinite future, and (b) would benefit if the Rule were then in effect.

3. Whether the legislative review procedures of Section 21(a) of the Federal Trade Commission Improvements Act of 1980 constitute a valid involvement by Congress in the quasi-legislative rulemaking delegated to the Federal Trade Commission by a duly enacted statute.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. ——

UNITED STATES HOUSE OF REPRESENTATIVES, APPELLANT

v.

FEDERAL TRADE COMMISSION, ET AL.[1]

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the court of appeals is not yet reported.[2] The order of the district court certifying the constitutional question to the court of appeals (Senate App. 7a–8a) is reported in 1982–2 Trade Cas.

[1] The parties to the proceeding in the court of appeals were Consumers Union of U.S., Inc. and Public Citizens, Inc., the plaintiffs in this case, and the Federal Trade Commission, the United States House of Representatives, and the United States Senate, named in the complaint as defendants.

[2] The opinion of the court of appeals is reprinted in the appendix to the Senate Jurisdiction Statement, as is the district court memorandum denying the motion of the Senate and House of Representatives for relief from the certification order and we have not reproduced them here to avoid duplication. Citation to these decisions will be to the Senate Appendix.

(CCH) ¶ 64,817. The memorandum order of the district court denying the motion of the United States Senate and House of Representatives for relief from the certification order (Senate App. 13a–20a) is reported in 1982–2 Trade Cas. (CCH) ¶ 64,865.

JURISDICTION

The judgment of the court of appeals (Senate App. 21a–22a) was entered on October 22, 1982. Section 21(f)(2) of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. § 57a–1(f)(2) (Supp. IV 1980), provides that an "appeal shall be brought not later than 20 days after the decision of the court of appeals." In accordance with that requirement, timely notices of appeal were filed by the United States House of Representatives and the Senate on November 4, 1982.[3] Senate App. 23a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1252 and Section 21(f)(2) of the Federal Trade Commission Improvements Act of 1980.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 21 of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. § 57a–1 (Supp. IV 1980), and other relevant portions of the Federal Trade Commission Act, are set forth at Senate App. 26a–33a.

STATEMENT

The House of Representatives need not repeat here the legislative background of the provisions

[3] The notice of appeal of the House of Representatives is reprinted in the appendix hereto, App. 1a.

in dispute in this appeal—the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub.L.No. 93–637, 88 Stat. 2183 (1974), specifically the legislative review provisions of the Act permitting congressional disapproval of the Federal Trade Commission proposed rules under the Act, and the House relies on the Senate's presentation of the relevant legislative background to the adoption of the legislative review provisions. *See* Senate Jurisdictional Statement at 2–6.

Because the House believes that this case also raises serious questions under the Article III "case or controversy" requirement, the House states the following additional facts:

1. Section 21(f), the provision under which the action was filed in the district court, provides:

> *Any interested party may institute such actions* in the appropriate district court of the United States, including actions for declaratory relief, *as may be appropriate* to construe the constitutionality of any provision of this section. (emphasis added).

15 U.S.C. § 57a–1(f)(1).

The statute does not further define the term "interested party," but the legislative history contains a single sentence discussion of the term. "Such actions may be initiated by an interested party, which would include all persons who participated in the particular rulemaking that is the subject of the suit." H.Conf.Rep.No. 917, 96th Cong., 2d Sess. 38 (1980) *reprinted in* [1980] U.S. Code Cong. & Ad. News 1155. There is no definition or discussion whatever

in the legislative history of what constitutes "such actions . . . as may be appropriate" that the interested party may institute in the district court.

2. The main thrust of Section 21(f) is toward certification of constitutional questions and expedited appellate consideration thereof. It provides that, after the interested party has filed an appropriate action in the district court, that court

> . . . immediately shall certify all questions of the constitutionality of this section to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

15 U.S.C. § 57a–1(f)(1).

The appellate court's decision on such certified matters is then made reviewable by appeal directly to this Court. Such appeal must be brought not later than 20 days after the decision of the court of appeals. 15 U.S.C. § 57a–1(f)(2). Nothing in these certification and appeal provisions purports to define or expand the "appropriate" action in the district court that triggers these provisions.

3. The legislative history of these provisions also reveals that Congress desired to provide a procedural means for resolving disputes over the constitutionality of the legislative review provisions of the Act, but said nothing about sweeping away Article III prerequisites of standing and adverseness. "The conferees are *hopeful* that these procedures will result in a definitive Supreme Court decision on the question of constitutionality." (emphasis added) H.Conf.Rep. No. 117, *supra* at 38. At the time the section was

inserted, no case involving the legislative review mechanism had yet reached the Supreme Court. *See* 126 Cong. Rec. S1090 (daily ed., Feb. 9, 1980) ("Before many more laws are constructed which delegate authority to the executive branch agencies and which rely on this reservation of authority by the Congress, it is important to have a definitive resolution of the constitutionality of this procedure. . . . [I]t may be some time before another case is properly framed around this question.") (remarks of Senator Muskie).

4. The House of Representatives did not file in the district court an answer to the complaint, nor did it have an opportunity to contest its being named as a party defendant. Nor did the House have opportunity to protest the alignment of the plaintiffs and the Federal Trade Commission on the same side of the suit, and the effect of such a friendly suit on justiciability of this action. All this stemmed from the premature *ex parte* certification of the constitutional questions by the district court to the court of appeals. Senate Jurisdictional Statement at 4–5, and Senate App. 17a.

5. The House of Representatives, in jointly moving with the Senate for relief from the ex parte order of certification, sought to add a second question concerning whether the case presented a justiciable case or controversy. The district court denied the motion and stated: "That issue goes to the jurisdiction of the Court to entertain the case and a court may always question its jurisdiction. Jurisdiction is an issue presented in every case brought in a federal court." Senate App. 18a. The district court further concluded

that the question which the House posed concerning justiciability need not be certified under the Act "since that question does not address the constitutionality of the statute itself." Senate App. 19a.

6. The plaintiffs' complaint in this case states that, in the case of Consumers Union of U.S., "[i]t participated in the FTC's Used Car Rule Proceedings," Complaint ¶ 3, and that . . . "the Rule would benefit CU Members, who have bought and who can be expected to buy used cars from dealers . . ." *Id.*, appendix hereto, App. 4a, and in the case of Public Citizen, Inc., that it is a non-profit organization . . . [which] engages in a wide variety of activities with a particular focus on protecting and augmenting the rights of consumers." Complaint ¶ 4. appendix hereto, App. 5a. Public Citizen further alleged that the proposed rule "would have benefited Public Citizen's supporters and its nearly 50 employees, many of whom can be expected to purchase used cars in the future . . ." *Id.*[4]

[4] It is clear that "an organization whose members are injured may represent those members in a proceeding for judicial review." *Sierra Club* v. *Morton*, 405 U.S. 727, 739 (1972). But absent any injured members, an organization that has a mere "interest in a problem" has no Article III injury. *Id.* The two plaintiff organizations in this case appear to fall within the latter category. No member has been shown to have been injured in fact. Indeed, the members, employees and contributors said to compose these organizations have not been shown to play any "part in the operation or administration" of the organizations, or to elect any officials, or to attend any membership meetings. *See FEC* v. *National Right to Work Committee*, No. 81-1506, slip opinion, p. 9 (Dec. 13, 1982). Even if a "member" could be said to have been "injured" in this case, it seems that neither organization has demonstrated its standing to represent that "member."

On the threshold questions of standing and lack of adverseness argued by the House, the court of appeals ruled first that plaintiffs had standing because through the "interested party" language the Congress intended to confer "standing to seek judicial review to the full extent permissible by Article III," and that both organizations satisfied the standing requirement because "the FTC's used car rule would have secured significant assistance and protection for the used car buyers they represent." *Id.* The court of appeals explained in a footnote that plaintiffs had sustained "injury in fact" which was traceable to the action of the House and Senate defendants which could be redressed by favorable decision: "Members of the two consumer organizations are handicapped in their efforts to make informed used car purchases by the lack of a disclosure rule. Congress' veto, and the FTC's decision to abide by it, prevented the used car rule from taking effect. Finally, this court's decision, that the veto was unconstitutional, will clear the way for the rule to become effective." Senate App. 3a, n. 9.

On the issue of adverseness, the court of appeals concluded that naming the legislative bodies *eo nomine,* who "vigorously aired their position on the constitutionality of the congressional veto," Senate App. 3a, invested the suit with sufficient Article III adverseness. The court of appeals stated in this connection that neither House had sought dismissal.[5]

[5] Given the *ex parte* nature of the certification the case was "in" the court of appeals before any motion to dismiss could be filed in district court.

The court of appeals also cited the resolution authorizing the Senate Legal Counsel to represent the Senate in the ensuing litigation and the enactment of the statutory procedures themselves under the Act as evidence of an "exceptional situation" which "supplied the requisite adverseness . . . [and which] effectively invited our expeditious resolution of the constitutional questions at issue." Senate App. 4a.

The court's complete discussion of the merits consisted of a brief preamble stating the constitutional questions presented and three numbered paragraphs summarily answering those questions in the affirmative. All three answers were prefaced by the phrase: "For the reasons given in *Consumers Energy Counsel* [v. *FERC*]." Senate App. 4a–5a.

THE QUESTIONS ARE SUBSTANTIAL

A. THE ADVERSENESS QUESTIONS

The House of Representatives submits that this case presents the most serious and far-reaching questions of justiciability yet posed in any of the cases involving legislative review mechanisms. *Chadha* v. *Immigration and Naturalization Service*, 634 F.2d 408 (9th Cir. 1980) *prob. juris. post. and cert. granted* 454 U.S. 812 (1982) *restored to calendar for reargument*, 102 S.Ct. 3507 (1982); *Consumer Energy Council of America* v. *Federal Energy Regulatory Commission*, 673 F.2d 425 (D.C. Cir. 1982). In neither of those cases had either the House or Senate been named a party defendant in the original action; in both, the House and Senate participated as *amici*

and only intervened *after* judgment to press those very justiciability concerns inextricably enmeshed in these cases. The jurisprudential effects of naming the House and Senate as parties, and the rationale offered by the court of appeals for countenancing the alignment of plaintiffs and defendant FTC on the same side of the suit, are potentially far-reaching and unsettling. The court of appeals holding on this point portends consequences not only for the House of Representatives as a legislative body,[6] but for private and other public litigants as well.

Moreover, the adverseness analysis of the court of appeals failed to consider or address significant questions concerning the limited role of the courts in resolving inter-branch disagreements, not all of which rise to the level of justiciable "cases or controversies." *Compare United States* v. *Nixon,* 418 U.S. 683, 696 (1974) ("In the constitutional sense controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve") with *Goldwater* v. *Carter,* 444 U.S. 996, 1004 (1979) (Burger, CJ., Stewart, Rehnquist, Stevens,

[6] To the extent that the legislative bodies are now amenable to suit in challenges to the constitutionality of actions taken exclusively in the chamber, the court of appeals has worked a fundamental innovation in jurisprudence, for nothing is better settled than that a legislative body is beyond the jurisdiction of the courts as a party when exercising its legislative discretion. *McChord* v. *Louisville & N.R. Co.*, 183 U.S. 493, 495–96 (1901).

Serious problems now arise as to whether the two Houses of Congress can be sued without some express statutory consent Do they not share in the sovereign immunity of the "United States" from suit, absent consent?

JJ., concurring) ("we are asked to settle a dispute between co-equal branches of our Government, each of which has resources not available to protect and assert its interests, resources not available to private litigants outside the judicial forum"). Fashioning "cases or controversies" by institution of friendly suits between private plaintiffs and governmental agencies, forced to confess unconstitutionality upon command from the Department of Justice, also presages the spectre of countless advisory opinions on "political questions" thrust upon the courts visa such a device.

In this case, the FTC "deferred to the Department of Justice, as its counsel in this case, for the presentation of legal argument regarding the constitutionality of Section 21 [of this Act]." Brief for the Defendant Federal Trade Commission at 3 n.2. The ability of the President, through the Department of Justice, to collaterally attack statutes governing administration of so-called independent agencies also works disruption of the scheme envisioned by Congress in creating these agencies free of overweaning Presidential influence.

B. THE STANDING QUESTION

By conferring Article III standing upon the plaintiff organizations, who demonstrated nothing more than that they participated in a rule-making proceeding and some of whose members might some day purchase a used car and thus "would have benefited" from adoption of the used car rule, the decision below raises jurisprudential concerns of the highest dimen-

sion. Simply put, assuming Congress intended to expand to the Article III limits the ability of "interested parties" to file "appropriate" actions pursuant to Section 21(f)(1), can such plaintiffs satisfy the constitutional minima where they allege only future expectations of benefits had a rule of law been made effective? There is not even an averment that either organization or member thereof members purchased a used car since congressional disapproval of the used car rule. Have plaintiffs alleged anything more than a general consumer interest in the problems in the used car market? *See Sierra Club* v. *Morton,* 405 U.S. 727, 739 (1972).

Plaintiffs made no attempt, beyond the bare conclusory allegations of their complaint, to proffer any direct and palpable injury, or any concrete facts upon which a court could determine that members of plaintiffs' organization purchased a used car, much less how purchase of a car without the stickers required by the FTC's proposed rule, would injure them in a judicially cognizable manner. Satisfied that injury was supplied by the lack of "disclosures that would assist them in making informed purchasing decisions" Senate App. 3a, the court of appeals created a standing criterion which opens the door of federal courts of any plaintiff who pleads unrealized expectations and generalized disappointment in failure of a rule or government program to become effective.

What we are witnessing here is a standing phenomenon that is increasingly associated with litigation questioning the validity of the legislative disapproval device. In this case, the dominating fact is

that Congress, in Senate Concurrent Resolution 60, voted to *disapprove* the proposed FTC rule. By that "no" vote, Congress preserved the legal *status quo* respecting used car sales. And by that "no" vote, Congress made it impossible for any private individual or organization to acquire Article III standing to challenge the constitutionality of such negative action. How can one be legally injured by the refusal of Congress to permit a proposed rule of law to become effective? How can there be any judicial redress for such an "injury"?

In short, the Article III standing minima cannot be allowed to rest upon the citizens' loss of expectation of benefits that would presumably ensue has a proposal become law. That would corrupt the policies and the purposes of the Article III minima. And it would lead to a needless avalanche of federal court suits by those disappointed by legislative judgments.

C. THE CONSTITUTIONAL ISSUES

Little need be said here as to the substantiality of the questions involving the constitutionality of the legislative review procedures embodied in Section 21(a) of the Federal Trade Commission Improvements Act. This Court is well aware of the arguments posed by the parties herein.

Suffice it to say that the House of Representatives deems it critical to the preservation of the federal structure of government that recognition be given to the power of Congress to say "no" to a proposed rule of law.

CONCLUSION

For these reasons, probable jurisdiction should be noted and the judgment below vacated or reversed.

Respectfully submitted.

STANLEY M. BRAND,
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STEVEN R. ROSS,
Deputy Counsel to the Clerk,
MICHAEL L. MURRAY,
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RECEIVED
NOV 4 - 1982
CLERK OF THE UNITED STATES COURT OF APPEALS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1737

CONSUMERS UNION OF U.S., INC.,
AND PUBLIC CITIZEN, INC.,

Plaintiffs,

v.

FEDERAL TRADE COMMISSION, UNITED STATES SENATE,
AND UNITED STATES HOUSE OF REPRESENTATIVES,

Defendants.

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the United States House of Representatives hereby appeals to the Supreme Court of the United States from the judgment entered in this case on October 22, 1982, holding unconstitutional section 21(a) of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. §57a-1(a) (Supp. IV), and Senate Concurrent Resolution 60 of the 97th Congress.

This appeal is taken pursuant to 28 U.S.C. §1252 (1976) and 15 U.S.C. §57a-1(f)(2)(Supp. IV 1980).

Respectfully submitted,

Stanley M. Brand

Stanley M. Brand
General Counsel to the Clerk
U.S. House of Representatives
H-105 The Capitol
Washington, D.C. 20515
202-225-7000

Dated: November 4, 1982

SUMMONS IN A CIVIL ACTION

CIV. 1a (2-64)
(Formerly D.C. Form No. 45a Rev. (6-49))

United States District Court

FOR THE
District of Columbia

PENN, J.

82- 1512

CIVIL ACTION FILE NO. _____

Consumers Union of U.S., Inc.
and
Public Citizen, Inc.

Plaintiff

v.

United States Senate
and
United States House of Representatives
and
Federal Trade Commission

Defendant

SUMMONS

To the above named Defendant : United States House of Representatives

You are hereby summoned and required to serve upon Ellen Broadman

plaintiff's attorney , whose address 1511 K Street, N.W.
Suite 1033
Washington, D.C. 20005

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JAMES F. DAVEY
Clerk of Court.

Deputy Clerk.

Date: JUN 2 1982

(Seal of Court)

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONSUMERS UNION OF U.S., INC.,
1511 K Street, N.W., Suite 1033
Washington, D.C. 20005
(202) 783-6130

and

PUBLIC CITIZEN, INC.,
2000 P Street, N.W.
Washington, D.C. 20036
(202) 293-9142

Plaintiffs,

v.

FEDERAL TRADE COMMISSION
Pennsylvania Avenue at 6th St, NW
Washington, D.C. 20580

UNITED STATES SENATE
United States Capitol
Washington, D.C. 20510

and

UNITED STATES HOUSE OF REPRESENTATIVES
United States Capitol
Washington, D.C. 20515

Defendants.

PENN, J.

82- 1512

Civil Action No.

COMPLAINT FOR DECLARATORY JUDGMENT

I

INTRODUCTION

1. Consumers Union of U.S., Inc., and Public Citizen, Inc. bring this action seeking a declaratory judgment that the

congressional veto of the Used Car Rule and the congressional veto provisions of the Federal Trade Commission Improvements Act of 1980 are invalid under the United States Constitution. Plaintiffs further seek a declaration that the defendent Federal Trade Commission ("FTC" or "Commission") is obligated to make effective and implement its Used Car Rule.

II

JURISDICTION

2. The jurisdiction of this Court is invoked under 15 U.S.C. Section 57a-1(f)(1) and 28 U.S.C. Section 1331.

III

PLAINTIFFS

3. Plaintiff Consumers Union of U.S., Inc. ("Consumers Union" or "CU"), is a nonprofit membership corporation chartered in 1936 and existing under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. It publishes Consumer Reports, a magazine with a circulation of approximately 3 million, which regularly carries articles on automobiles to assist CU members in purchasing used and new cars. Consumers Union represents the interests of its approximately 400,000 members in federal rulemaking proceedings and in litigation before the courts. It participated in the FTC's Used Car Rule proceedings and urged the Commission to adopt an earlier proposed version of the Rule with minor amendments. The Rule would benefit CU members, who have bought

and who can be expected to buy used cars from dealers, by requiring dealers to disclose known mechanical defects and dealer warranties. Consumers Union's members are and will be adversely affected by the Congressional veto and the Commission's failure to make effective and implement the Rule.

4. Public Citizen, Inc. is a non-profit organization supported by the contributions of approximately 40,000 individuals each year. It engages in a wide variety of activities with a particular focus on protecting and augmenting the rights of consumers. The FTC's Used Car Rule which was vetoed would have benefited Public Citizen's supporters and its nearly 50 employees, many of whom can be expected to purchase used cars in the future, by requiring dealers to disclose known mechanical defects and dealer warranties.

IV

DEFENDANTS

5. Defendant Federal Trade Commission is an agency of the United States. It issued the Used Car Rule which is the subject of this action, but has failed to make the Rule effective because of the congressional veto of the Rule.

6. Defendant United States Senate is named as a party under Fed. R. Civ. P., Rule 19 because it has an interest relating to the subject of the action because it voted to veto the Used Car Rule and is so situated that the disposition of this action in its absence may impair or impede its ability to protect that interest.

7. Defendant United States House of Representatives is named as a party under Fed. R. Civ. P., Rule 19 because it has an interest relating to the subject of the action because it voted to veto the Used Car Rule and is so situated that the disposition of this action in its absence may impair or impede its ability to protect that interest.

V

FACTUAL BACKGROUND OF THIS ACTION

8. On August 3, 1981, pursuant to its authorities under Section 18 of the Federal Trade Commission Act, 15 U.S.C. Section 57a, and Section 109(b) of the Magnuson-Moss Warranty Act, 15 U.S.C. Section 2309(b), the FTC promulgated a trade regulation rule concerning the sale of used motor vehicles (the "Used Car Rule"). The Used Car Rule requires dealers to post a window sticker on used cars offered for sale to consumers which is required to describe certain major mechanical defects known to the dealer and the dealer's warranties. 46 Fed. Reg. 41330 (Aug. 14, 1981). The Rule addresses two major problems the FTC found in the used car market: (a) widespread oral misrepresentations by dealers about warranty coverage and (b) widespread oral misrepresentations and omissions of material facts by dealers about used cars' mechanical conditions.

9. On May 18, 1982, and May 26, 1982, in accordance with Section 21(a) of the Federal Trade Commission Improvements Act, 15 U.S.C. Section 57a-1(a), the Senate and the House respectively approved Senate Concurrent Resolution 60, which vetoed the Used Car Rule.

10. Concurrent Resolution 60 and Section 21(a) of the Federal Trade Commission Improvements Act, 15 U.S.C. Section 57a-1, which authorized Concurrent Resolution 60, violate the Constitution because they (a) violate the principles of separation of powers by depriving the Executive Branch of its powers and functions under Article II to faithfully administer the laws of the United States, and by infringing upon the powers and functions of the Judiciary under Article III to interpret the Constitution and laws of the United States and to adjudicate rights under those laws; (b) nullify procedures established by Article I for the enactment of laws of the United States, including the presentment of approved legislation to the President and the Presidential power to return that legislation to Congress, and (c) improperly delegate administrative power to Congress without any standards for the exercise of that power.

XIII

RELIEF

WHEREFORE plaintiff prays:

A. That this Court immediately enter an order, pursuant to Section 21(f)(1) of the Act, 15 U.S.C. Section 57a-1(f)(1), certifying the question of the constitutionality of Section 21(a) to the United States Court of Appeals for the District of Columbia Circuit;

B. That this Court and the Court of Appeals advance on the docket and expedite this action to the greatest extent possible, as provided in 15 U.S.C. Section 57a-1(f)(3);

C. That the Court of Appeals enter a judgment declaring that Section 21(a) of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. Section 57a-1(a) and the congressional veto of the Used Car Rule (Senate Concurrent Resolution 60) are unconstitutional and hence null and void;

D. That the States Court of Appeals enter a judgment declaring that the Commission is obligated to make effective and implement the Used Car Rule;

E. That plaintiffs be awarded their costs and disbursements of this litigation, including reasonable attorney's fees, and

F. That plaintiffs be granted such other and further relief as the Court deems just and proper.

Respectfully submitted,

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Attorneys for Plaintiffs

Dated: June 2, 1982

Office-Supreme Court, U.S.
FILED
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CLERK

Nos. 82-935 and 82-1044

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES SENATE, APPELLANT

v.

FEDERAL TRADE COMMISSION, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, APPELLANT

v.

FEDERAL TRADE COMMISSION, ET AL.

ON APPEALS FROM THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

REX E. LEE
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Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

The following question was certified to the court of appeals by the district court pursuant to 15 U.S.C. (Supp. V) 57a-l(f)(l):

"Whether Section 2l(a) of the Federal Trade Commission Improvements Act [of 1980], 15 U.S.C. [(Supp. V) 57a-l(a)], and Senate Concurrent Resolution 60, which was approved by the Senate and House of Representatives, (a) violate the principles of separation of powers established in Articles I, II and III of the Constitution; (b) violate the procedures established by Article I for the exercise of legislative powers; and (c) improperly delegate administrative power to Congress without any standards for the exercise of that power."

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-935

UNITED STATES SENATE, APPELLANT

v.

FEDERAL TRADE COMMISSION, ET AL.

No. 82-1044

UNITED STATES HOUSE OF REPRESENTATIVES, APPELLANT

v.

FEDERAL TRADE COMMISSION, ET AL.

ON APPEALS FROM THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Sen. J.S. App. 1a-5a)[1] is not yet reported. The order of the district court certifying the constitutional question to the court of appeals (*id.* at 7a-8a) is reported at 1982-2 Trade Cas. (CCH) para. 64,187. The memorandum order of the district court denying the motion of the United States Senate and House of

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[1] "Sen. J.S." refers to the Jurisdictional Statement filed by the Senate in No. 82-935.

Representatives for relief from the certification order (Sen. J.S. App. 13a-20a) is reported at 1982-2 Trade Cas. (CCH) para. 64,865.

JURISDICTION

The judgment of the court of appeals (Sen. J.S. App. 21a-22a) was entered on October 22, 1982. Notices of appeal were timely filed by the United States Senate and House of Representatives on November 4, 1982 (*id.* at 23a; H.R. J.S. App. 1a),[2] pursuant to 15 U.S.C. (Supp. V) 57a-1(f)(2). The jurisdictional statement in No. 82-935 was filed on December 6, 1982, and the jurisdictional statement in No. 82-1044 was filed on December 20, 1982. The jurisdiction of this Court in both cases is invoked under 28 U.S.C. 1252 and Section 21(f)(2) of the Federal Trade Commission Improvements Act of 1980, 15 U.S.C. (Supp. V) 57a-1(f)(2), as extended by Pub. L. No. 97-377 96 Stat. 1830. See note 4, *infra*.

STATEMENT

1.a The Used Car Rule that was promulgated by the Federal Trade Commission in 1981 and is at issue in this case arose out of an investigation conducted in 1973 by one of the Commission's regional offices. See 46 Fed. Reg. 41329 (1981).[3] This investigation resulted in a recommendation that the Commission, pursuant to its authority to make rules regarding deceptive acts or practices in commerce (15 U.S.C. (& Supp. V) 45 and 46(g)), issue a rule to prevent certain deceptive practices in the sale of used cars.

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[2]"H.R. J.S." refers to the Jurisdictional Statement filed by the House of Representatives in No. 82-1044.

[3]The history of the used car rulemaking proceeding is set out in detail in 46 Fed. Reg. 41329-41330 (1981), published when the Commission issued its final rule, and in H.R. Rep. No. 97-586, 97th Cong., 2d Sess. (1982).

In 1975, while the rulemaking proceeding was in progress, the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act became effective. 15 U.S.C. 2301 *et seq.* That Act specifically directed the Commission to initiate a rulemaking proceeding dealing with "warranties and warranty practices in connection with the sale of used motor vehicles." 15 U.S.C. 2309(b). On August 14, 1981, the Commision published its final rule concerning representations of warranty coverage and disclosures of accurate information in connection with the sale of used cars. See 46 Fed. Reg. 41328-41378. The rule requires dealers to post a window sticker on used cars offered for sale to consumers describing: (1) certain major mechanical defects known to the dealer; (2) whether the dealer offers any warranties on the car; and (3) the nature of such warranties.

b. While the used car rulemaking proceeding was still pending, Congress enacted the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374. Section 21(a) of that Act required the Commission to submit all final trade regulation rules to Congress. See 15 U.S.C. (Supp. V) 57a-1(a). Any such rule would become effective unless within 90 days of continuous session the Senate and House of Representatives "adopt[ed] a concurrent resolution disapproving such final rule." 15 U.S.C. (Supp. V) 57a-1(a)(2). If a rule were disapproved, the Commission could promulgate a revised final rule based on the earlier record and any necessary supplementation, and this revision was to be submitted to Congress before becoming effective. 15 U.S.C. (Supp. V) 57a-1(c).

The Act also provided a special mechanism for the prompt resolution of any constitutional challenge to the provision for congressional disapproval of rules. See 15 U.S.C. (Supp. V) 57a-1(f). Under this mechanism, if an action is filed in a United States district court to "construe the constitutionality of" the legislative veto provision, the

district court is required to certify all questions of constitutionality immediately to the appropriate court of appeals, which shall hear the matter sitting en banc.[4]

Consistent with the requirements of Section 21 of the 1980 Act, the Commission submitted its final Used Car Rule to each House of Congress on September 9, 1981.[5] On May 18, 1982, the Senate passed Senate Concurrent Resolution 60, disapproving the Rule. 128 Cong. Rec. S5402 (daily ed. May 18, 1982).[6] The House of Representatives passed the resolution on May 26, 1982. 128 Cong. Rec. H2882-H2883 (daily ed. May 26, 1982). In view of the legislative veto of the Rule, the Federal Trade Commission issued a statement indicating that it was taking the matter under advisement pursuant to Section 21(c) of the 1980 Act, which, as stated above, provides for possible revision and resubmission of the Rule to Congress. See 47 Fed. Reg. 24542 (1982).

2. Following the legislative veto of the Rule, appellees Consumers Union of the United States, Inc., and Public Citizen, Inc., filed this action in the United States District

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[4]Section 21 of the 1980 Act was to lapse on September 30, 1982. See Section 21(i) of the (1980) Act, 94 Stat. 396. However, Section 101(a)(3) of Pub. L. No. 97-276, 96 Stat. 1186, by incorporating the substance of S. 2956 (97th Cong., 2d Sess.), which was reported to the Senate on September 24, 1982, temporarily continued Section 21 in effect. Section 21 was further extended through September 30, 1983 by Pub. L. No. 97-377, 96 Stat. 1830. See 128 Cong. Rec. H10564 (daily ed. Dec. 20, 1982).

[5]Because of the technicalities of the continuous session requirement (see 15 U.S.C. (Supp. V) 57a-1(g)), the rule was resubmitted to Congress on January 28, 1982 (Sen. J.S. App. 2a n.3).

[6]The resolution provided in full: "*Resolved by the Senate (the House of Representatives concurring),* That the Congress disapproves the final rule promulgated by the Federal Trade Commission dealing with the matter of the trade regulation rule relating to the sale of used motor vehicles, which final rule was submitted to the Congress on January 28, 1982" (Sen. J.S. App. 24a).

Court for the District of Columbia on June 2, 1982. The Federal Trade Commission, the United States Senate, and the House of Representatives were named as defendants. The plaintiffs alleged that their members would be directly harmed by the legislative veto and the consequent failure of the Commission to make the Used Car Rule effective (H.R. J.S. App. 4a-5a). They sought a declaratory judgment that the legislative veto provisions of the Federal Trade Commission Improvements Act, as well as the veto resolution itself, are unconstitutional. In addition, they sought an order requiring the Commission to implement its final Used Car Rule (*id.* at 7a-8a).

On June 29, 1982, the district court certified the constitutional question to the court of appeals (Sen. J.S. App. 7a-8a). On July 23, 1982, the district court denied a motion filed by the Senate and the House of Representatives for relief from this order, concluding that there were no factual issues to be resolved by the district court in order to facilitate the court of appeals' resolution of the constitutional question certified to it (*id.* at 13a-20a).

3. On consideration of the certified question, the court of appeals, sitting en banc, unanimously held[7] that the legislative veto provisions of Section 21(a) of the Federal Trade Commission Improvements Act and Senate Concurrent Resolution 60 passed pursuant to that Section "violate the principles of separation of powers established in Articles I, II and III of the Constitution" and "violate the procedures established by Article I for the exercise of legislative powers" (Sen. J.S. App. 4a). In so holding, the court adopted the reasoning of the panel of that court in *Consumer Energy Council of America* v. *FERC*, 673 F.2d 425 (D.C. Cir. 1982), appeals docketed and petitions for cert. pending, Nos. 81-2008, 81-2020, 81-2151, 81-2171, 82-177 and 82-209,

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[7]Judges Wald, Mikva and Scalia did not participate.

which, the en banc court noted, had "thoroughly considered and disposed of" the constitutional issues (Sen. J.S. App. 4a).[8]

The court of appeals also concluded as a threshold matter that the plaintiffs had standing to bring the constitutional challenge. The court observed that it was undisputed that Congress, in expressly authorizing "[a]ny interested party" to file an action challenging the statute's legislative veto provisions (15 U.S.C. (Supp. V) 57a-l(f)(l)), intended to permit standing to seek judicial review to the full extent permitted by Article III of the Constitution (Sen. J.S. App. 2a). The court of appeals observed that both Consumers Union and Public Citizen "speak on behalf of consumers, in this instance, used car purchasers, who seek disclosures that would assist them in making informed purchasing decisions," and that "but for the veto's intervention, the FTC's used car rule would have secured significant assistance and protection for the used car buyers they represent" (*id.* at 2a-3a). This injury, the court concluded, satisfies Article III standing requirements.

The court of appeals similarly held that the present case satisfies the adverseness requirements of Article III, noting that "[t]he House and Senate, as named defendants, have vigorously aired their position on the constitutionality of the congressional veto, and have not sought dismissal of the complaint against them" (Sen. J.S. App. 3a).

DISCUSSION

The en banc court of appeals, adopting the reasoning of the panel of that court in *Consumer Energy Council of*

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[8]In view of its conclusion on the other aspects of the certified question, the court of appeals declined to express an opinion as to whether Section 21(a) of the Act and Senate Concurrent Resolution 60 improperly delegated administrative power to Congress without any standards for the exercise of that power (Sen. J.S. App. 5a).

America v. *FERC*, unanimously held that the legislative veto provision of the Federal Trade Commission Improvements Act and the concurrent resolution of disapproval passed pursuant to that provision are inconsistent with the procedures in Article I of the Constitution for the exercise of legislative powers and violate the principles of separation of powers established by Articles I, II and III of the Constitution.

The constitutionality of the legislative veto device is an issue that plainly warrants resolution by this Court. However, the Court heard reargument on December 7, 1982, in *INS* v. *Chadha*, Nos. 80-1832, 80-2170 and 80-2171, which also presents this issue. In the briefs on behalf of the Immigration and Naturalization Service in *Chadha*, we have argued that the legislative veto device is unconstitutional for essentially the same reasons given by the District of Columbia Circuit in *Consumer Energy Council of America* v. *FERC*, and adopted by the en banc court in this case. Accordingly, we suggest that these appeals be held pending a decision by this Court in *Chadha*.

As we have explained more fully in the Memorandum for the United States in *Consumer Energy Council of America* (at 12-18), the Constitution furnishes no basis for distinguishing this case from *Chadha* on the grounds that it involves a legislative veto of a rule rather than an order entered at the conclusion of an adjudicatory proceeding and that the Officers of the United States responsible for promulgating the rule may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. 15 U.S.C. 41; see *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). Nor does the fact that this case involves a statute authorizing a two-House legislative veto, and therefore does not violate the bicameralism requirement of Article I, Sections 1, 7 and 8 of the Constitution, distinguish it

from *Chadha* and *Consumer Energy Council of America* for purposes of constitutional analysis. Section 21(a) of the Federal Trade Commission Improvements Act does not provide for a resolution of disapproval to be presented to the President, as required by Article I, Section 7 of the Constitution, and it violates the principles of separation of powers by directly involving the Legislative Branch in the execution of the laws. These are independent grounds for invalidation of the legislative veto device. Sen. J.S. App. 4a; *Consumer Energy Council of America* v. *FERC, supra,* 673 F.2d at 461-477.[9]

2. The House of Representatives, but not the Senate, has raised two issues in addition to the constitutionality of the legislative veto provision in 15 U.S.C. (Supp. V) 57a-1(a): (i) whether appellees Consumers Union and Public Citizen have standing to bring this suit, and (ii) whether there is an absence of "adverseness" in the case that deprives the courts of jurisdiction under Article III of the Constitution. See H.R. J.S. 8-12. These questions are insubstantial, and the unanimous en banc court of appeals correctly rejected the House of Representatives' contention as to each.

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[9]Paragraph (3) of the judicial review provision of Section 21 of the Federal Trade Commission Improvements Act provides that "[i]t shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under paragraph (1)." 15 U.S.C. (Supp. V) 57a-1(f)(3). The Court already has received full briefing and has twice heard argument on the constitutionality of the legislative veto in *Chadha*. Because the decision in *Chadha* may dispose of the constitutional questions presented in this case, holding the instant appeals pending the decision in *Chadha* is, in our view, fully consistent with the congressional purpose underlying 15 U.S.C. (Supp. V) 57a-1(f)(3) of obtaining a prompt ruling by this Court on the constitutionality of the legislative veto device. The Senate has expressly refrained from moving that its appeal be expedited, because it recognizes that the Court's disposition of *Chadha* "may affect future proceedings in this appeal" (Sen. J.S. 9 n.7). The House of Representatives likewise has not moved to expedite its appeal.

a. The court of appeals noted that it was "undisputed" in this case that Congress, by granting a right to "[a]ny interested party" to challenge the constitutionality of the legislative veto device, intended to permit standing to seek judicial review to the full extent permitted by Article III. Sen. J.S. App. 2a; compare *Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 372 (1982); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 103 n.9, 109 (1979). The House of Representatives does not contend otherwise. See J.S. 11.

As the court of appeals found, appellees Consumers Union and Public Citizen speak on behalf of used car purchasers who seek disclosures that would assist them in making informed decisions,[10] and they alleged that but for the legislative veto, the Federal Trade Commission's Used Car Rule would have provided significant assistance and protection for the used car buyers they represent (Sen. J.S. App. 3a). The court of appeals correctly concluded that this injury to the organizations' members satisfies Article III standing requirements. See also *Buckley* v. *Valeo*, 424 U.S. 1, 11-12 (1976). This Court recently held that the injury sustained as a result of the inability to obtain accurate information in the manner required by statute satisfies Article III standing requirements. *Havens Realty Corp.* v. *Coleman, supra*, 455 U.S. at 373-374. It follows from *Havens Realty* that the injury sustained by the members and employees of Consumers Union and Public Citizen as a result of the legislative veto of a rule that would have provided for the furnishing of information likewise satisfies Article III standing requirements.

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[10]See H.R. J.S. App. 4a-5a (allegations in complaint concerning injury to members); Sen. J.S. App. 11a-12a (stipulation between plaintiffs and Federal Trade Commission concerning facts as to standing).

b. The House of Representatives also errs in contending (J.S. 8-10) that this case lacks the "adverseness" required by Article III of the Constitution. The Federal Trade Commission did not place the Used Car Rule into effect because of the legislative veto of that Rule. The Commission's failure to do so injured the consumers that Consumers Union and Public Citizen represent, and this injury would be redressed if the district court on remand ordered the Commission to make effective and implement the Rule—the relief sought in the complaint (H.R. J.S. App. 8a)—or remanded to the Commission for further consideration without regard to the legislative veto. As we explain in our Reply Brief to the Motions to Dismiss the INS's appeal in *Chadha* (at 11-14)[11] and in the principal brief on the merits in *Chadha* (at 73-74),[12] the agency's refusal to grant the relief requested furnishes the necessary adverseness for Article III purposes, irrespective of whether the agency and the private party or parties agree on the merits of the underlying constitutional question.[13] Thus, the House of Representatives' argument would be without merit even if the Senate and House of Representatives were not parties in this case.

The Senate and House of Representatives are parties, however, and they have actively defended the validity of the legislative veto. The House of Representatives contends (J.S. 9 & n.6) that it was not amenable to suit. But even if the House is correct on this point, the Senate does not assert an

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[11]1981 Term, No. 80-1832.

[12]1981 Term, Nos. 80-1832, 80-2170 and 80-2171.

[13]The Federal Trade Commission has declined to place the Used Car Rule into effect pending a final judicial resolution of the constitutionality of the legislative veto of that Rule and has deferred to the Attorney General for the presentation of legal argument regarding the constitutionality of Section 21(a) of the Federal Trade Commission Improvements Act.

immunity defense in this Court. As the court of appeals observed (Sen. J.S. App. 3a-4a), a Senate resolution authorized the Senate Legal Counsel to defend the Senate in this case. Moreover, the Senate concedes (J.S. 5 n.6) that it did not move to be dismissed from the case and that it presented a defense of the statute on the merits, and the Senate now urges (J.S. 7,9) the Court to reach and decide the question of the constitutionality of the legislative veto. Thus, whatever the proper resolution of the House of Representatives' immunity point, the Senate's current posture plainly lends an additional adversariness to the proceedings.

CONCLUSION

The appeals should be held pending the Court's decision in *INS* v. *Chadha* and disposed of in light of that decision.

Respectfully submitted

REX E. LEE
Solicitor General

JANUARY 1983

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

UNITED STATES HOUSE OF REPRESENTATIVES, APPELLANT

v.

FEDERAL TRADE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

A Motion for Leave to file Amici Curiae Brief,
and the Brief Amici Curiae of
The Honorable Charles Pashayan, Jr.,
The Honorable Trent Lott,
The Honorable Charles Elson Roemer III,
The Honorable Eugene A. Chappie,
The Honorable Vic Fazio,
The Honorable Thomas N. Kindness
The Honorable Norman Yoshio Mineta,
The Honorable Marvin H. Mickey Edwards,
and the Honorable Gerald B. Solomon
Members of the United States House of Representatives,
In Support of Appellant

Honorable Charles Pashayan, Jr.
Member of the United States House
of Representatives
129 Cannon House Office Building
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Tuesday, June 28, 1983

Amicus Curiae

MOTION

This Motion to file the annexed amici curiae brief, in support of Appellant in United States House of Representatives v. FTC, S. Ct. No. 82-1044 ("Used Car Case"), out of time, is submitted for the reason that the Court's recent decision in Chadha v. INS has prompted amici to submit the annexed brief in the nature of intervening matter under Rule 22.6, for the Court's consideration. The interest of amici, The Honorable Charles Pashayan, Jr., The Honorable Trent Lott, The Honorable Charles Elson Roemer III, The Honorable Eugene A. Chappie, The Honorable Vic Fazio, The Honorable Thomas N. Kindness, The Honorable Norman Yoshio Mineta, The Honorable Marvin H. Mickey Edwards, and the Honorable Gerald B. Soloman, derives from their individual membership in the United States House of Representatives. The brevity of time makes it unlikely that Counsel of the House shall be able to file any further supplemental briefs under Rule 22.6.

Amici curiae believe that the Court should grant plenary consideration in the Used Car Case for the following reasons:

1- The statutory authority to issue broad rules and regulations in the Used Car Case is fundamentally different from the adjudicatory nature of the proceeding in Chadha; see Separate Concurring Opinion of Justice Powell in Chadha v. INS.

2- Historical materials, believed not to be before the Court in Chadha, exist that indicate that intrinsic in the legislative power vested in Congress by Article I is Congress's Constitutional right to reserve by statute the option to nullify agency or departmental rules and regulations by the legislative veto, all of which are non-textual to the Constitution.

As the dissenting justice opined, the decision may broadly affect the provisions in a wide range of statutes. The Court is well aware that ststutes are to be saved from unconstitutionality if possible. The Chadha decision is too blunt an instrument to adjudicate the rule-making legislative vetoes at issue in the FTC case. Full argument and briefing will enable the Court to determine whether these devices, applied in a wholly different context from Chadha, are also unconstitutional.

The importance of the questions presented in this case can hardly be disputed, affecting as it does virtually hundreds of agency rules and regulations. Indeed, speculation has already arisen concerning the reach of Chadha to other legislative review devices, and to clarify the applicability of its ruling the Court should order full briefing and argument to make it clear whether the Chadha ruling is dispositive.

AMICI CURIAE BRIEF

ARGUMENT

The historical material submitted herewith fully indicates that legislative review and management of delegated legislation were used by both Parliament and the early American Congresses. This material alone provides support for granting plenary consideration in the Used Car Case to asses the different stiuation presented by rule-making review mechanisms.

I. The Historical Development of Delegated Authority and Its Management.

Contrary to many statements made by counsel and in briefs in both the Chadha and the present case, neither delegated legislation nor the legislative veto find their origins in the 20th Century. Rather, the origins can be traced deep into British history, into the history of the American colonies, and into the history of the first American Congresses.

A. Delegated Authority.

1. British.

Apart from at least two early statutes, one passed by Parliament in 1337 (10 Edward III, c. 1), and the other in 1385 (III Rolls of Parliament 204), most scholars fix the reign of Henry VIII as the beginning of delegated authority in the modern sense. The Statute of Wales (34 and 35 Henry VIII, c. 26), enacted in 1542-43, authorized Henry VIII to issue rules for governing Wales, including the power to levy taxes (see also 28 Henry VIII, c. 17; and 1 Edward VI, c. 11; and 31 Henry VIII, c. 5). The Statute of Sewers, enacted in 1531, remarkedly modern, granted Commissioners "full Power and Authority to make, constitute, and ordain Laws, Ordinances, and Decrees..." (23 Henry VIII, c. 5, s. 1). (For examples in the Seventeenth Century, see 12 Charles II, c. 22; 13 and 14 Charles II, c. 5; and 22 and 23 Charles II, c. 8.) Despite the fact that Eighteenth Century statutes were passed in great detail, Parliament continued delegating legislative authority. In 1769, for example, Parliament passed an act empowering certain harbor commissioners "to make such By-Laws, Rules, Orders, and Regulations, as shall be found necessary for the Purposes in this Act..." (9 George III, c. 8, s. 10). Some were couched in broad statutory terms (see, e.g., 2 George III, c. 32; 10 George III, c. 27; 15 George III, c. 65; 16 George III, c. 62; 31 George II, c. 25; 15 George III, c. 21; 6 George I, c. 18; 30 George II, c. 20; 19 George II, c. 5; 14 George III, c. 19; 13 George II, c. 3; and 30 George II, c. 1).

Others were passed to regulate the delegatee's affairs (see, e.g., 16 George III, c. 13; 31 George II, c. 18; 15 George III, c. 24; 15 George III, c. 21, 16 George III, c. 61; 6 George III, c. 24). Yet others combined these (see, e.g., 10 George III, c. 25; 9 George III, c. 13; 9 George III, c. 21; 15 George III, c. 60; 15 George III, c. 66; 9 George III, c. 22; 7 George III, c. 85; 9 George III, c. 22; 9 George III, c. 21; 14 George III, c. 56, and 9 George III, c. 31).

Particularly notable is Eighteenth Century British delegated legislation regarding the American colonies. Four are especially notable. In 1774, Parliament passed an act to discontinue shipping activities in Boston, and conferred on the King, by Order in Council, the power to make important legal definitions (14 George III, c. 19). Later that year, Parliament gave the Council for the Affairs of the Providence of Quebec the power to make ordinances (14 George III, c. 83). In 1765, Commissioners for Managing the Stamp Duties were granted the authority to make "Rules and Orders..." (George III, c. 13).

Most noteworthy is an act passed in 1778, granting Commissioners the power to make "Regulation, Provision, Matters..." to quiet disorder (18 George III, c. 13), but they should not become effective until confirmed by Parliament.

2. Early Congressional Delegated Authority.

That the idea of delegated legislation was, along with other principles of English government, a part of the British inheritence which not only formed the background for the writing of the Constitution but also the guidance for Congressional practice, is evident from the early Acts containing provisions for delegated legislation. For example, in 1791, the Congress passed "An Act to incorporate the subscribers to the Bank of the United States," which provided, "The President, Directors and Company, of the Bank of the of the United States... [shall]... ordain, establish, regulations, as shall seem necessary and

convenient for the government of said corporation" (1st Cong., Sess. III, Ch. 10). This Act is not dissimilar in form to the British Acts of the Eighteenth Century, containing provisions for delegated legislation. Thus, the early American Congresses took up the centruies-old Parliamentary practice of delegated legislation. It is clear that they regarded it as inherent in Article I legislative power.

B. The Legislative Management of Delegated Legislation.

Like the subject it is meant to manage, the legislative veto evolved from its British antecedents, called the "laying system." While massive use of both delegated legislative authority and the laying system and legislative veto is a relatively modern phenomenon, its origins are traceable into British Parliamentary and American Congressional history. In each, again, it is clear that the early Congresses regarded procedural management of delegated legislation as intrinsic to its Constitutional legislative power.

1. British Antecedents.

British statutes, many passed in the Eighteenth Century, required the delegatees to lay before Parliament matters relating to finances or monies (see, e.g., 1 George I. c. 21; 23 George II, c. 24; 9 Anne, c. 21; 27 George III, c. 13; 33 George III, c. 29; 13 George III, c. 83; 33 George II, c. 11; and 31 George II, c. 38).

The laying procedure was also applied to account for government activities in general (see, e.g., 28 George III, c. 54; 29 George III, c. 66; 30 George III, c. 33; 23 George II, c. 31; 25 George II, c. 40; 24 George III (Session 2), c. 25; 33 George III, c. 52; 23 George II, c. 24; 30 George II, c. 1; 31 George II, c. 37; 12 George III, c. 37; 15 George III, c. 31; 15 George II, c. 29; 16 George II, c. 26; 18 George II, c. 25; 17 George II, c. 30; 22 George II, c. 42; 7 George III,

c. 58; 10 George III, c. 40; 21 George III, c. 58; 26 George III, c. 43; 8 George II, c. 29; 9 George II, c. 42; and 26 George III, c. 107). Likewise, Parliament passed a few acts requiring the laying of judgments and decrees (see, e.g. 31 George II, c. 39; 2 George III, c. 37; 20 George III, c. 38; 22 George III, c. 80; 31 George c. 39; 2 George III, c. 37; 20 George III, c. 38; 22 George III, c. 80; 5 George III, c. 8; and 31 George II, c. 24).

Parliament passed statutes requiring that delegated legislation be laid. In 1791, the King himself was required to lay before Parliament orders he was authorized to make in respect the prices of corn (31 George III, c. 30; see also 33 George III, c. 65; 39 and 40 George III, c. 87; and 23 George II, c.31)

Most importantly, in the 1778 Act cited supra (18 George III, c. 13), Parliament empowered certain colonial officials to issue regulations, which could not take effect without Parliament's approval. While this statute did not have an explicit laying provision, it is to be substantively inferred from the requirement for approval.

These measures taken by Parliament at oversight and management bear significant precedence for their development in the United States, and establish that the whole body of informal law and management developed along with formally enacted statutes.

2. American Control.

It was indeed no more an accident that the early Congress adopted the laying procedure than the other British procedures (see, e.g., Burleigh Cushing Rodick, American Constitutional Custom: A forgotten Factor In The Founding (New York, 1953)). "The early House of Representatives also resembled the Commons in its system of standing committees, its committees of the whole, its rules for debate and the conduct of its members" (at 117).

Thus, in emulation of the British statutory language, several Congressional

statutes required that the various delegatees "lay before" Congress various matters (see, e.g., 1st Cong., Sess. II, Ch. 22; 5th Cong., Sess. II, Ch. 38; 8th Cong., Sess. I, Ch. 46; 3rd Cong., Sess. II, Ch. 43; 4th Cong, Sess. I, Ch. 21; 10th Cong., Sess. II, Ch. 17; 3rd Cong., Sess. II, Ch. 45; 7th Cong., Sess. I, Ch. 32; 10th Cong., Sess. II, Ch. 28; 11th Cong., Sess. II, Ch. 37; 7th Cong., Sess. II, Ch. 27; 3rd Cong., Sess. I, Ch. 14; and 8th Cong., Sess. II, Ch. 26).

Most important, there are two notable examples of the laying of delegated legislation. After the Louisiana Purchase, the Congress in 1804 passed an act dividing Louisiana into two territories. In establishing the government for the territories, Congress granted rule-making authority to the governors, but made the rules subject to the legislative veto:

> The legislative power shall be vested in the governor, and in thirteen of the most fit and discreet persons of the territory.... The governor shall publish throughout the said territory, all the laws which shall be made, and shall from time to time report the same to the President...to be laid before Congress; which, if disapproved of by Congress, shall thenceforth be of no force (8th Cong., Sess. I, Ch 38, s. 4) (emphasis added).

In 1805, the Congress passed an Act containing an almost identical provision (8th Cong., Sess. II, Ch. 31). These are among the clearest examples of the development of the legislative veto as an inherent aspect of Article I legislative power. The Congress clearly followed in the footsteps of Parliament in employing the laying procedure to control the delegate's exercise of delegated legislation. These Congressional statutes are indeed in the nature of the 1778 Act, cited supra, in which the delegated legislation should not become effective without Parliament's approval.

C. Conclusion.

By vesting all the Legislative power in the Congress, the Framers had in mind more than the procedural sequence prescribed in Article I, Section 7, as

circumscribed by Section 8 and the other limitations. The early Congress's adoption of Parliamentary rules, procedures, and the laying system, is evidence that the legislative power was meant to include both delegated legislation and its management by procedural device.

II. A Comparison of the British and American Doctrines of Separation of Powers.

It is a mistaken notion in the United States that there is "no Constitution" in Britian and therefore no separation of powers. Certainly neither should be invoked to invalidate the historical development and precedent of delegated legislation and the laying system and legislative veto.

The orthodox view in British legal theory is that there is a British Constitution, much of it written (see, e.g., D.C. M. Yardley, Introduction to British Constitutional Law (London, Fourth Edition, 1974). It embodies a doctrine of separation of powers that separates the Crown as the executive from Parliament as the legislative (see, e.g., John Locke, Second Treatise, Chapter XII, Sec. 147, as supported by M. J. C. Vile, Constitutionalism and the Separation of Powers (Oxford, 1976); Sir William Blackstone, Commentaries on the Laws of England; and Montesquieu, The Spirit of the Laws; see also various Eighteenth century British statutes, e.g., 12 and 13 William III, c. 2, prohibiting Crown officials from being members of Parliament; see also 6 Anne, c. 7; 15 George III, c. 22; 25 George III, c. 52; 22 George III, c. 80; 23 George III, c. 87; 20 George III, c. 38; 20 George III, c. 49; and 20 George III, c. 54. See also various regency acts, 1 William and Mary, Second Session, c. 2; 12 and 13 William III, c. 2, and 5 George III, c. 27. See also, e.g., 16 George III, c. 34, and 5 George III, c. 8, for descriptions of the power to execute laws as vested in agents of the Crown.).

Members of the British Cabinet wear two hats: legislative, as ordinary members of Parliament; and executive, as agents of the Crown. While this arrangement would now violate the Ineligibility and Incompatibility Clauses, the

division of these powers remains intact in British theory.

The methods of amending the two constitutions differ: in Britian, the process is the same for changing the constitution as for passing an ordinary statute. But the constraints of custom and convention play a prominent role in British Constitutional law, making changes in the British Constitution markedly more difficult, as it is more difficult to amend the American Constitution than to pass statutes.

In respect to the legislature's right to manage delegated legislation, the relationship between Congress and Parliament is analogous and should offer support to the validity of the legislative veto.

III. Conclusion.

The Court in Chadha implies that the Framers envisioned only a textual method of legislating. But British practice, well-known to the Framers and in many instances explicitly or impliedly incorporated in early Congressional practice, strongly indicates that the Constitution's Article I legislative power was intended to comprehend both delegated legislation and the legislature's right to review and manage it by parliamentary procedure.

Chadha concerned a particular agency action concerning a particular individual. In the Used Car Case, something quite different is at stake: broad rules and regulations affecting a class, which itself in the future will require individual application by the issuing agency.

Secondly, Chadha decided against a one-house legislative veto, whereas the Used Car Case involves a two-house legislative veto. The historical evidence is ample that both in Parliamentary and early Congressional practice, the historical right to manage delegated legislation was exercised by the whole legislature, Parliament or Congress.

On these two main distinctions, amici curiae submits that the Court should grant plenary consideration in the Used Car Case.